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Beverly Smith

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ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BERT E. BLACK,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 54A01-0804-CR-187

No. 54A05-0804-CR-208

November 26, 2008

BAILEY, Judge

Case Summary

Bert E. Black (“Black”) argues that his sentence for Operating While Intoxicated Causing Endangerment and two counts of Resisting Law Enforcement, all Class A misdemeanors, is inappropriate. We affirm.

Facts and Procedural History

This matter concerns two incidents of criminal conduct addressed in a single plea agreement. On June 19, 2006, a law enforcement officer identified himself and ordered Black to stop. He ran from the officer. Meanwhile, on November 8, 2006, Black was driving a motorcycle and passed to the right of another vehicle. At the time, he was impaired by a medication. When a law enforcement officer investigated and attempted to place Black in a police car, Black resisted, pushing with his arms and kicking the officer.

In cause number 54D02-0609-CM-04885 (“4885”), the State charged Black with Disorderly Conduct, as a Class B misdemeanor,¹ Resisting Law Enforcement, as a Class A misdemeanor,² and Cruelty to an Animal, as a Class A misdemeanor.³ He failed to appear for hearings on October 6, 2006 and January 8, 2007.

In cause number 54D02-0611-FD-06092 (“6092”), the State charged Black with Battery on a Law Enforcement Officer, a Class D felony,⁴ Resisting Law Enforcement, a Class A misdemeanor, Operating While Intoxicated Causing Endangerment, a Class A

¹ Ind. Code § 35-45-1-3.

² Ind. Code § 35-44-3-3.

³ Ind. Code § 35-46-3-12.

⁴ Ind. Code § 35-42-2-1.

misdemeanor,⁵ and Criminal Mischief, as a Class A misdemeanor.⁶ Also, the State alleged that Black was a Habitual Substance Offender.⁷ Black failed to appear for his jury trial in Cause 6092, although he had been in his attorney's office the previous day.

Pursuant to a plea agreement, Black pled guilty to: Resisting Law Enforcement and Operating While Intoxicated Causing Endangerment (Cause 6092) and a second count of Resisting Law Enforcement (Cause 4085), all Class A misdemeanors. The State dismissed all remaining counts in both causes, as well as the allegation that Black was a Habitual Substance Offender. The plea agreement provided as follows: "Consecutive 365 day sentences on each count shall be imposed (three-year total sentence), with the court to determine how much, if any, of said sentence shall be suspended and any terms of probation, as well as all other terms." Cause 4085 Appendix at 46. The following appeared in handwriting, with the initials "BB": "One year cap on initial executed time." Id.

During the plea hearing, the trial court confirmed the parties' agreement regarding a "one year cap on initial executed time." Cause 4885 Sentencing Transcript at 4. The trial court accepted the plea agreement and entered judgments of conviction. It found one aggravating circumstance, Black's criminal history, and one mitigating circumstance, his mental health issues and his attempt to keep them under control through treatment and medication. Black was sentenced to 365 days for each conviction, with the terms to run consecutively. On each, the trial court suspended all but 120 days. Also, the trial court

⁵ Ind. Code § 9-30-5-2(b).

⁶ Ind. Code § 35-43-1-2(a).

⁷ Ind. Code § 35-50-2-10.

ordered 240 days of formal probation for each of the terms. This resulted in an aggregate sentence of three years, with 360 days executed.

Black now appeals.

Discussion and Decision

Black argues that his sentence is inappropriate. Under Indiana Appellate Rule 7(B), this “Court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(B); see IND. CONST. art. VII, § 6. A defendant ““must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.”” Anglemyer v. State, 868 N.E.2d 482, 494 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)), clarified on other grounds, 875 N.E.2d 218 (Ind. 2007).

We begin by noting that most of Black’s sentence was determined by acceptance of the plea agreement, including the aggregate term of three years⁸ and the one-year cap on executed time. Effectively, the trial court’s discretion was limited to ordering the execution and/or suspension of one year of the sentence. We therefore limit our analysis to the trial court’s decision to order the execution of 360 days.

We know little about the details of the three crimes. In June 2006, Black ran away

⁸ The maximum term for a Class A misdemeanor is one year. Ind. Code § 35-50-3-2. Therefore, for these three Class A misdemeanor convictions, accepting the plea agreement required the trial court to order the maximum term for each of the convictions and to order the terms to run consecutively.

from a law enforcement officer. Five months later, he ingested a controlled substance and drove a motorcycle, passing to the right of another vehicle. As a law enforcement officer attempted to place Black in the police car, Black resisted forcefully and kicked the officer in the leg.

As to his character, Black testified as follows. He served in the U.S. Navy from 1990 until 1994, seeing active duty in Desert Shield and Desert Storm. In 1993, he was diagnosed with post-traumatic stress disorder (“PTSD”), which resulted from a series of traumatic events: (1) at age 16, he was raped by a man dressed as a police officer; (2) during his military service, he was detained at gunpoint in a foreign country, electrocuted, and burned; (3) he was arrested for battery on a police officer and beaten, suffering a broken nose and injuries to his ribs and throat; and (4) while serving on a submarine, Black helped contain flooding in the torpedo room; his area was shut off with armed guards posted at the door. Black offered no exhibits to support his testimony. Over time, Black received a series of different prescriptions to treat PTSD and possibly other medical conditions.

Black’s first conviction was in January 2003. Therefore, in the four years from 2003 through 2006, not including the instant offenses, he had multiple misdemeanor convictions, including two for possession of marijuana and “several” for public intoxication. Sent. Tr. at 17. He violated his probation at least once.

We respect Black’s service to his country in an armed conflict and his being diagnosed with PTSD. However, his failure to attend three proceedings of the Montgomery Superior Court suggests a reluctance to work cooperatively with the judicial system.

Black has not persuaded us that his sentence is inappropriate.

Affirmed.

RILEY, J., and BRADFORD, J., concur.